Nik Mohd Yusri bin Ibrahim lwn SAC Dato' Mohd Rodzi bin Ismail, Pengerusi Lembaga Tatatertib Briged Tengah, Pasukan Gerakan Am, PDRM, Cheras, Selangor dan lain-lain

MAHKAMAH TINGGI (SHAH ALAM) — SEMAKAN KEHAKIMAN NO BA-25–133–09 TAHUN 2016
TUN ABD MAJID PK
5 DISEMBER 2018

Undang-Undang Pentadbiran — Semakan kehakiman — Permohonan — Pemohon dituduh dengan empat pertuduhan — Pemohon dikenakan hukuman buang kerja — Sama ada berlaku pelanggaran prinsip keadilan asasi — Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 peraturan 37

Pada 22 Februari 2016 pemohon yang ketika itu berpangkat Lans Koperal telah menerima suatu surat tunjuk sebab bertarikh 10 Februari 2016 di mana terdapat empat pertuduhan dikemukakan. Tindakan tatatertib ini diambil di bawah peraturan 37 Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993. Pertuduhan pertama dan kedua berkaitan dengan kelewatan mengemukakan sijil cuti sakit sementara pertuduhan ketiga dan keempat berkaitan dengan kegagalan membawa borang Pol 62 ('penyata sakit') semasa menjalani rawatan perubatan. Hukuman yang boleh dikenakan ialah dibuang kerja atau diturunkan pangkat. Pemohon telah menjawab pertuduhan-pertuduhan tersebut melalui surat representasi bertarikh 10 Mac 2016 dan pada 13 Jun 2016 dia menerima surat yang ditandatangani oleh responden pertama bertarikh 26 Mei 2016 di mana keputusannya ialah pemohon dibuang kerja bagi keempat-empat pertuduhan tersebut. Pemohon mengemukakan permohonan bagi semakan kehakiman ke atas keputusan responden-responden menjatuhkan hukuman buang kerja daripada perkhidmatan Polis Diraja Malaysia berkuatkuasa pada 16 Mei 2016. Peguam pemohon yang terpelajar berhujah bahawa tiada notis mengenai laporan prestasi akan diambil kira semasa hukuman dijatuhkan dengan itu berlakunya satu pelanggaran prinsip keadilan asasi di mana pemohon tidak berpeluang untuk memberi jawapan.

Diputuskan, membenarkan permohonan pemohon:

(1) Laporan prestasi past conducts pemohon diambil kira ketika hendak menentukan hukuman. Ini telah mencatatkan proses bagi mencapai keputusan yang dibuat oleh responden-responden berpandukan kes *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364 dan kes *Mohd Sobri bin Che Hassan v Pihak*

Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor [2018] 3 MLJ 784 (lihat perenggan 8–10).

[English summary

On 22 February 2016 the applicant at that time a Lance Corporal received a show cause letter dated 10 February 2016 where four charges were submitted. This disciplinary action was taken under regulation 37 of the Public Officers (Conduct and Disciplinary) Regulations 1993. The first and second charges were related to the delay of filing a sick leave certificate while the third and the fourth charges were related to the failure to bring Pol 62 ('sick report') during medical treatment. The sentence that could be given was dismissal or demoted. The applicant had replied the charges through a letter of representation dated 10 March 2016 and on 13 June 2016 he received a letter signed by the first respondent dated 26 May 2016 where the decision was that the applicant was to be dismissed for the four charges. The applicant submitted an application for judicial review on the results of the respondents on imposing a sentence of dismissal from the Royal Malaysian Police service effective 16 May 2016. The learned counsel of the applicant argued that no notice regarding of the performance report would be taken into account during the sentence being imposed thereby an infringement of the principle of fundamental justice in which the applicant had no opportunity to answer.

Held, allowing the applicant's application:

(1) The past conducts performance report of the applicant was taken into account when determining the sentence. This had resulted in the process of achieving the decisions made by the respondents according to the case of *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364 and *Mohd Sobri bin Che Hassan v Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor* [2018] 3 MLJ 784 (see paras 8–10).]

Nota-nota

Untuk kes-kes mengenai permohonan semakan kehakiman, lihat 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) perenggan 329–407.

Kes-kes yang dirujuk

Mohd Sobri bin Che Hassan v Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor [2018] 3 MLJ 784, MR (dirujuk)

Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor [1990] 3 MLJ 364, MA (dirujuk)

Undang-undang yang dirujuk

Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 peraturan 37

Zaliha Mohd Janis (Peguam Kanan Persekutuan, Kamar Penasihat Undang-Undang Negeri Selangor) bagi pihak pemohon.
Ebrina Zubir (Maniam Nair & Co) bagi pihak responden.

Tun Abd Majid PK:

[1] Pemohon mengemukakan permohonan bagi semakan kehakiman ke atas keputusan responden-responden menjatuhkan hukuman buang kerja daripada perkhidmatan Polis DiRaja Malaysia ('PDRM') berkuatkuasa pada 16 Mei 2016.

FAKTA KES

[2] Pada 22 Februari 2016 pemohon yang ketika itu berpangkat Lans Koperal telah menerima suatu surat tunjuk sebab bertarikh 10 Februari 2016 (eksh NIK1) di mana terdapat empat pertuduhan dikemukakan. Tindakan tatatertib ini diambil di bawah peraturan 37 Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993. Pertuduhan pertama dan kedua berkaitan dengan kelewatan mengemukakan sijil cuti sakit sementara pertuduhan ketiga dan keempat berkaitan dengan kegagalan membawa borang Pol 62 (penyata sakit) semasa menjalani rawatan perubatan. Hukuman yang boleh dikenakan ialah dibuang kerja atau diturunkan pangkat.

[3] Pemohon telah menjawab pertuduhan-pertuduhan tersebut melalui surat representasi bertarikh 10 Mac 2016 (eksh NIK2) dan pada 13 Jun 2016 dia menerima surat yang ditandatangani oleh responden pertama bertarikh 26 Mei 2016 di mana keputusannya ialah pemohon dibuang kerja bagi keempat-empat pertuduhan tersebut (eksh NIK3).

ISU

[4] Pemohon telah membangkitkan beberapa isu untuk mencabar keputusan responden-responden. Saya telah memaklumkan kepada kedua-dua pihak agar memfokuskan kepada isu laporan prestasi yang telah diambil kira dalam menentukan hukuman ke atas pemohon tanpa memberi peluang kepada pemohon untuk menjawabnya.

[5] Di dalam eksh B afidavit pemohon (kandungan 35) minit mesyuarat lembaga tatatertib bertarikh 16 Mei 2016 telah dikemukakan di mana perenggan 3.4 dicatatkan seperti berikut:

> Lembaga Tatatertib yang bersidang berpuashati bahawa wujudnya kesalahan tatatertib yang dilakukan oleh subjek. Perbuatan subjek tidak hadir tugas dan lewat mengemukakan Sijil Cuti Sakit di atas ketidakhadiran hari yang berkenaan telah menjejaskan kelancaran tugas yang telah diatur. Subjek hanya mengemukakan Sijil

> Cuti Sakit apabila terdapat laporan tidak hadir bertugas ke atasnya dibuat. Ini jelas memperlihatkan sikap sambil lewa dan tidak bertanggungjawab subjek. Kelewatan mengemukakan Sijil Cuti Sakit dan gagal membawa Pol 62 ketika lapor sakit merupakan perbuatan ingkar perintah yang perlu ditangani dengan tegas agar tidak menjadi kebiasaan atau ikutan dikalangan anggota yang lain. Laporan prestasi menunjukkan subjek tidak konsisten untuk mematuhi arahan dan sering mengulangi pelanggaran disiplin yang sama. Subjek tidak menunjukkan semangat kerja yang baik dan mempunyai sikap negative termasuk seringkali tidak hadir tugas.

Selanjutnya di perenggan 6.7 afidavit responden pertama (kandungan 37) menyatakan seperti berikut:

> Laporan Prestasi *past conducts* Pemohon tidak diambilkira untuk mencapai keputusan Pemohon bersalah terhadap keempat-empat pertuduhan yang berkaitan. Laporan Prestasi *past conducts* dipertimbangkan untuk penentuan hukuman setelah Pemohon didapati bersalah.

[6] Peguam pemohon yang terpelajar berhujah bahawa tiada notis mengenai laporan prestasi ini akan diambil kira semasa hukuman dijatuhkan dengan itu berlakunya satu pelanggaran prinsip keadilan asasi di mana pemohon tidak berpeluang untuk memberi jawapan.

[7] Peguam kanan persekutuan dalam hujah beliau menekankan bahawa pemohon tidak menafikan pertuduhan-pertuduhan yang dikemukakan dan telah diberi peluang untuk menjawab pertuduhan-pertuduhan tersebut melalui representasi bertulis. Rujukan kepada laporan prestasi ketika menjatuhkan hukuman dan bukannya sejak awal iaitu di peringkat untuk mendapati pemohon bersalah atau tidak.

[8] Di dalam kes *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364 pemohon telah didapati bersalah dan dibuang kerja. Dalam mencapai keputusan untuk buang kerja pihak responden telah mengambil kira atau mempertimbangkan rekod kelakuan lampau pemohon tanpa memberi peluang kepada pemohon untuk menyangkal atau memberi penerangan mengenainya. Jemuri Serjan HMA (beliau ketika itu) di ms 367–369 menyatakan seperti berikut:

> The core of the appellant's complaint in regard to the breach of the rules of natural justice was the fact that the first respondent, in arriving at its decision to dismiss her from service, took into account extraneous matters, namely, the appellant's record of past conducts which were entered in her record of service and produced by the Director-General of the Government Printers Department, Kuala Lumpur to the first respondent without giving her an opportunity to explain, contradict or rebut them.
>
> The basis of the appellant's contention in this respect was the contents of para (2) of

the show cause letter. We are clear in our minds that it was never the appellant's case that this paragraph constituted an additional charge which the appellant was not called upon to explain or exculpate herself from. Learned senior federal counsel, however, did not seem to appreciate the true nature of the appellant's contention. It is not surprising that he argued that the impugned para (2) of the show cause letter should be viewed merely as a warning to the appellant and that it was not the basis of the first respondent's decision or an additional charge. It was meant to serve as a reminder to her of the seriousness of the allegations against her because judging from her written representation she seemed to treat the show cause letter cursorily. Yet, curiously, in the same breath, he conceded that her previous undesirable conducts were taken into account for the purpose of inflicting punishment. Since para (2) was not a charge, the duty to afford her the opportunity to be heard on it did not arise at all. So ran the senior federal counsel's argument. It seemed obvious to us that learned senior federal counsel had palpably erroneously barked the wrong tree. This misconception probably explained why the respondents did not call any witness to controvert the appellant's contention on the irrelevancy of her past conducts for the purpose of the disciplinary action against her.

On a careful analysis of para (2) of the show cause letter, if became evident there was an implicit acknowledgment on the part of the first respondent that it knew of the several disciplinary actions that had been taken against her and the punishments thereof on similar complaints as the one presently before it as well as other charges of misconducts. The information relating to the previous disciplinary actions were supplied by the Director-General of the Government Printers Department Kuala Lumpur when he submitted the record of service of the appellant to the first respondent and recommended to the first respondent that disciplinary action should be taken against her. A scrutiny of the agreed bundle of documents in the record of appeal revealed that the entries in the appellant's record of service showed that disciplinary actions were taken against her four times for being late to report for duty and three times for taking longer time to complete her work assignments. On these actions she was punished accordingly ranging from a warning, a fine and the withholding of her salary. It is not unreasonable, therefore, to infer that these were the matters referred to in para (2) of the show cause letter which actuated the first respondent to intimate to her through the show cause letter its intention to dismiss her. It did not escape our attention that the last sentence of para (2) of the show cause letter had an ominous ring to it when it said 'However, they had no effect on you'. In fact para (2) of the letter was so written as to reflect the state of mind of the first respondent on the issue of her dismissal.

In our view, para (2) of the show cause letter by itself constituted an intrinsic evidence that the first respondent, though acting perfectly in good faith, had taken these damaging materials into account in deciding to dismiss her, using her previous disciplinary actions and punishments as aggravated circumstances. Armed with the record of all the various disciplinary actions and punishments against her it would seem inevitable and indeed logical under the circumstances for the first respondent to have decisively reached at the determination to dismiss her. It was as if her casual attitude towards her previous disciplinary punishments demonstrated her as an obstinate, incorrigible and delinquent civil servant and under these circumstances, therefore, we could not see what other decisions the first respondent could otherwise possibly make. The adverse record had sealed her fate as a civil servant. It

seemed to us that the grounds for the disciplinary action before the first respondent by themselves were not serious enough to merit a dismissal without taking into account those damaging materials concerning the conduct of the appellant.

With all respect, the learned judge below should not have held that the first respondent was perfectly entitled to take into consideration the appellant's previous conduct without saying further that she must also be provided with an opportunity to explain or contradict them. The record of service as far as the disciplinary action before the first respondent was concerned contained extraneous matters, detrimental to the appellant's case. Even before the case of *Ridge v Baldwin* [1964] AC 40, Lord Denman CJ in *R v Smith* (1844) 5 QB 614 in dealing with the case of dismissal of a parish clerk held that even personal knowledge of the offence was no substitute for hearing the officer: his explanation might disprove criminal motive or intent and bring forward other facts in mitigation. We are not saying and should not be quoted as saying that the past record of the appellant should not be taken into account in considering her guilt or the appropriate punishment if she were found guilty of the charge. What we are saying is that if these materials which have such damning effect on her case are to be used against her she should be given a right to be heard on them. It is not a matter of pure technicality but it is absolutely fundamental in law that the appellant should have been given an opportunity of stating her case regarding her past conducts, considering that the dismissal of a civil servant is no light matter.

[9] Di dalam kes *Mohd Sobri bin Che Hassan v Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor* [2018] 3 MLJ 784 di ms 807 Asmabi Mohamad HMR menyatakan:

[43] We have examined the process undertaken by the first respondent which resulted in the dismissal of the applicant and found that there is merit in the applicant's argument. The first respondent had proceeded to impose the punishment of dismissal on the applicant without giving the applicant the opportunity to explain and/or contradict the detrimental portion of the report. We are of the view that this in itself constituted a breach of the rule of natural justice and or procedural unfairness/impropriety.

Selanjutnya di ms 810 beliau merumuskan seperti berikut:

[52] Turning now to the case at hand, it is not disputed that the applicant's previous misconduct was within the knowledge of the first respondent and from the record before us, the first respondent did not provide such information to the applicant. Neither was the applicant informed that such information may be used against him in meting out the punishment.

[53] Based on the above we were of the view that the process undertaken by the first respondent had infringed the rule of natural justice and/or was tainted with procedural impropriety. Hence, it is our finding that the learned JC had failed to properly evaluate the evidence before him and/or appreciate the relevant laws applicable to the factual matrix of this case in making his ruling against the applicant on this point.

[10] Perkara yang sama berlaku di dalam kes pemohon di mana laporan prestasi *past conducts* pemohon diambil kira ketika hendak menentukan hukuman. Ini jelas bagi saya telah mencatatkan proses bagi mencapai keputusan yang dibuat oleh responden-responden berpandukan kedua-dua kes yang dibincangkan.

[11] Oleh yang demikian saya telah membenarkan permohonan pemohon.

Permohonan pemohon dibenarkan.

Dilaporkan oleh Ahmad Ismail Illman Mohd Razali